

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of CHRISTINE GUSTAFSON and U.S. POSTAL SERVICE,
POST OFFICE, Streamwood, IL

*Docket No. 99-2388; Submitted on the Record;
Issued October 13, 2000*

DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant had no loss of wage-earning capacity.

In the present case, the Office accepted that appellant sustained internal derangement of the left knee and permanent aggravation of vascular necrosis, as a result of a July 12, 1997 employment incident. The record indicates that appellant returned to a modified letter carrier position on January 20, 1998 and she retired from federal employment on May 19, 1998. By decision dated March 26, 1999, the Office determined that appellant's actual earnings in the light-duty position represented her wage-earning capacity. The Office found that actual earnings met or exceeded the current wages for the date-of-injury position, and therefore she had no loss of wage-earning capacity.

The Board has reviewed the record and finds that the Office properly determined that appellant had no loss of wage-earning capacity.

Under section 8115(a) of the Federal Employees' Compensation Act, wage-earning capacity is determined by the actual wages received by an employee if the earnings fairly and reasonably represent her wage-earning capacity.¹ Generally, wages actually earned are the best measure of a wage-earning capacity and, in the absence of evidence showing that they do not fairly and reasonably represent the injured employee's wage-earning capacity, must be accepted as such measure.²

The Office's procedure manual provides that a retroactive determination may be made where the claimant has worked in the position for at least 60 days, the employment fairly and

¹ 5 U.S.C. § 8115(a).

² *Dennis E. Maddy*, 47 ECAB 259 (1995).

reasonably represents wage-earning capacity, and the work stoppage did not occur because of any change in the claimant's injury-related condition affecting her ability to work.³

In this case, the record indicates that appellant worked in a full-time light-duty position from January 20 to May 19, 1998. By letter dated January 27, 1999, the Office requested that appellant explain the circumstances surrounding her retirement in May 1998.⁴ There is no indication that appellant responded to this letter.

The medical evidence indicates that on April 2, 1998 Dr. Michael Gitelis, an orthopedic surgeon, reported that appellant still had pain in her knee. There is no medical evidence with respect to any disability for work commencing May 19, 1998, or an opinion that appellant's work stoppage was causally related to a change in her employment-related condition.

The record therefore indicates that appellant worked at the light-duty position for more than 60 days, with no probative evidence that the work stoppage was due to a change in the employment-related condition. There is no evidence that the light-duty position was part time, sporadic, seasonal or temporary work.⁵ As noted above, actual wages earned are generally the best measure of wage-earning capacity, and the Board finds that the Office properly found that the actual earnings fairly and reasonably represented appellant's wage-earning capacity. The requirements for a retroactive wage-earning capacity determination have accordingly been met in this case. The employing establishment indicated that the actual wages were equal to the current date-of-injury position wages, and thus the Office properly determined that appellant had no loss of wage-earning capacity.⁶

³ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.7(e) (May 1997).

⁴ This is in accord with the Office's procedures, which indicate that the Office should request explanation from the claimant, and if the response indicates that the claim is for a recurrence of disability, appropriate development should be undertaken. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reemployment: Determining Wage-Earning Capacity*, Chapter 2.814.9(b) (December 1995).

⁵ See *Monique L. Love*, 48 ECAB 378 (1997).

⁶ The record contains a December 3, 1999 decision of the Office issued after appellant filed her appeal with the Board that addresses a reconsideration request. It is well established that the Board and the Office may not have concurrent jurisdiction over the same case, and those Office decisions which change the status of the decision on appeal are null and void. *Douglas E. Billings*, 41 ECAB 880, 895 (1990).

The decision of the Office of Workers' Compensation Programs dated March 26, 1999 is hereby affirmed.

Dated, Washington, DC
October 13, 2000

Michael J. Walsh
Chairman

Willie T.C. Thomas
Member

Michael E. Groom
Alternate Member